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The International Criminal Court and Justice on the Ground

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I. INTRODUCTION

It is wonderful to be here today to celebrate Justice O'Connor's 80th birthday and to honor her enormous contribution to our national civic life. Let me acknowledge up front that the title of my essay conveys a certain double meaning. Justice O'Connor has always been a "justice on the ground." Grounded in experience and practical wisdom, she has always been concerned with the practical impact of Supreme Court decisions, and very determined that decisions should be understandable to the public (no footnotes allowed!). Moreover, her current work on "Our Courts" recognizes that maintaining fair, independent courts depends crucially on *public understanding of—and confidence in*—the role of courts in our legal and political system.

What is true of our courts is also true of the rule of law more broadly. Our civic institutions and processes cannot function effectively without people committed to accountable governance, due process, and resolving disputes peacefully and fairly in ways that protect basic rights. This all-too-human dimension is absolutely vital. For those of us who are scholars and practitioners, it is natural that we focus especially on the institutional "supply side" of the rule of law—strengthening courts, legislatures, executive agencies, and the like. But, there is also a "demand side" that deserves our attention—it involves reaching out to the population, giving people a stake in the law, paying attention to the vulnerable or aggrieved segments of a society, educating the next generation.

These two dimensions of strengthening the rule of law are important not only in our own society, but also in countries that have been wracked by violence and conflict, which is the subject of much of my recent scholarship.[1] Building credible legal institutions and building public

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1. *See* JANE STROMSETH, DAVID WIPPMAN & ROSA BOOKS, CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS (2006) (examining challenges of strengthening the rule of law after conflict and intervention); Jane Stromseth, *Post-Conflict Rule*

confidence in the very idea of the rule of law can be especially difficult when conflict-ridden societies have endured horrific atrocities—summary executions, amputations, mass rapes, forced recruitment of child soldiers. Reassuring citizens that, henceforth, such abuses will not be permitted to recur and that they will be protected from predatory state and non-state actors is crucial to building public confidence in the rule of law. The question, of course, is how to do this.

As war-torn societies struggle to move forward, the issue of accountability and redress for past abuses can be enormously difficult and divisive. Within specific countries, different groups and individuals may disagree strongly over how hard to press for criminal prosecutions, or whether to concentrate on other forms of accountability such as restorative justice and reparations for victims, often in the face of weak domestic justice systems, fragile peace settlements, limited resources and urgent reconstruction needs. From the Balkans to Rwanda, Sierra Leone to East Timor, Iraq to Afghanistan, Uganda to the Democratic Republic of Congo, difficult issues of justice and accountability pose challenges to societies struggling to move beyond conflict.

In situations where domestic legal institutions are unable to deliver fair justice, international criminal courts increasingly have stepped in to fill the vacuum. Especially in cases of large-scale violence against civilians, international tribunals have investigated, indicted, and tried alleged perpetrators. These courts focus, as they must, on delivering justice in fair and impartial trials that accord with international standards of due process. And they have, at times, produced dramatic results, convicting high-level political and military figures for egregious crimes, establishing an official record of the criminal responsibility of those involved.[2] Not surprisingly, a rich and important body of legal scholarship focuses on the jurisprudence of these courts; and political scientists also are giving increasing attention to the role of these courts, particularly the International Criminal Court, as important actors in international relations—analyzing their impact on peace processes that seek to bring an end to violent conflicts.[3]

Far less attention is being given, however, to the impact of these courts *on the ground* in the societies that have actually endured the atrocities. Are

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of Law Building: The Need for a Multi-layered, Synergistic Approach, 49 WM. & MARY L. REV. 1443 (2008) (summarizing book's themes and conclusions).

2. STROMSETH ET AL., *supra* note 1, at 263–64.

3. Recent scholarship on international criminal courts includes GARY J. BASS, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIME TRIBUNALS (2001); MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW (2007); DAVID LUBAN, JULIE O'SULLIVAN & DAVID P. STEWART, INTERNATIONAL AND TRANSNATIONAL CRIMINAL LAW (2009); INTERNATIONALIZED CRIMINAL COURTS (C. Romano, A. Nollkaemper & J. Kleffner eds., 2004).

they building public confidence in fair justice in those societies? Are they having any long-term impact on domestic capacity for justice? These are hugely important questions because, ultimately, the key to preventing future atrocities is building *local* capacity for justice and the rule of law. These are the questions this essay will focus on.

To offer some perspective on these questions, let me first address how international courts became such a "delivery platform" for criminal justice; and secondly, what challenges these courts have encountered in building justice on the ground, with some concrete examples.

II. HOW IS INTERNATIONAL CRIMINAL JUSTICE EVOLVING?

Four distinct eras or phases in international criminal justice have brought us to the present moment. The first era was the immediate post-World War II period, when the victorious allies mandated the tribunals in Nuremberg and Tokyo to try Nazi and Japanese defendants accused of crimes against the peace, crimes against humanity, and war crimes.[4] The traumas of World War II also galvanized further development of substantive international law, including the 1948 Genocide Convention, and the 1949 Geneva Conventions followed in 1977 by two additional Protocols.[5] The countries that became parties to these important treaties agreed to criminalize genocide and war crimes in their domestic law and to prosecute or extradite individuals within their jurisdiction suspected of these crimes.[6] But the cold war freeze, among other factors, stymied creation of more effective international enforcement mechanisms, and egregious crimes went unpunished.

A second era took flight nearly fifty years after Nuremberg, in the form of globally-sanctioned—not simply Allied-mandated—criminal tribunals. Faced with the mass atrocities of the Balkan wars and the genocide in Rwanda, the United Nations Security Council created the International Criminal Tribunal for the former Yugoslavia ("ICTY") in 1993, which sits at The Hague in the Netherlands, and the International Criminal Tribunal for Rwanda in 1994, which sits in Arusha, Tanzania.[7] Because many

4. LUBAN ET AL., *supra* note 3, at 73–74, 92–93.

5. The Convention on the Prevention and Punishment of the Crime of Genocide and the Geneva Conventions of August 12, 1949, as well as the two additional Protocols of June 8, 1977, are available at http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/index.jap.

6. For a discussion of these treaties, see STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 163–64 (2d ed. 2001).

7. *Id.* at 191, 201–02.

governments doubted that domestic prosecutions in the conflict-affected societies could be fair and impartial, the Security Council gave these international tribunals (made of up international judges, prosecutors, and other staff) primacy over domestic courts in the affected countries.[8] Moreover, the international tribunals were given ambitious goals: to seek justice by holding major perpetrators accountable for their crimes in accordance with international standards of due process; to build a truthful record of the horrific criminal acts; and to deter future atrocities. These tribunals, which are in the process of wrapping up their work, have accomplished a good deal, but their physical and psychological distance from the populations most affected by the atrocities has undercut their legitimacy and ability to demonstrate fair justice among critical local audiences.

In part for these reasons, a third era in international criminal justice featuring the development of the so-called "hybrid" courts commenced over the last decade. International actors and national reformers increasingly recognized that *preventing* egregious international crimes like genocide and crimes against humanity depends crucially on strengthening domestic justice systems in conflict-affected countries and building national capacity for the rule of law. This contributed to a greater international willingness to support innovative "hybrid" criminal courts made up of both international and domestic judges, prosecutors, defense counsel, and administrators and located, not in some far-off place, but instead, directly in the country that lived through the atrocities. Hybrid courts of various forms were set up over the last decade in East Timor, Sierra Leone, Bosnia-Herzegovina, and Cambodia.[9] By virtue of their hybrid nature and their location, these courts aspire to enjoy greater domestic legitimacy and a greater ability to build local capacity for justice than the more distant international criminal tribunals. Moreover, in a number of countries, criminal trials are supplemented by non-retributive accountability mechanisms, such as truth and reconciliation commissions, which can provide a fuller account of a conflict and its causes, offer a greater opportunity for direct participation by victims, recommend far-reaching reforms, and may also—as in East

8. *See* Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), Art. 9(2), May 25, 1993, U.N. Audiovisual Libr. of Int'l Law, *available at* http://untreaty.un.org/cod/avl/pdf/ha/icty/icty_e.pdf (tribunal has primacy over national courts); Statute of the International Criminal Tribunal for Rwanda (ICTR), Art.8(2), Nov. 8, 1994, U.N. Audiovisual Libr. of Int'l Law, *available at* http://untreaty.un.org/cod/avl/pdf/ha/ictr/ictr_e.pdf (same).

9. LUBAN ET AL., *supra* note 3, at 108–10, 122–29.

Timor—seek to promote reintegration of lesser perpetrators into the community through reconciliation agreements and rituals.[10]

This brings us to our fourth, and current era, which is marked by the establishment of the International Criminal Court ("ICC"), whose jurisdiction took effect in 2002.[11] The ICC was created by a treaty called the "Rome Statute," and it has jurisdiction over crimes against humanity, genocide, and war crimes—if the country on whose territory a crime occurred, or the country whose national is accused, is a party to the treaty or otherwise consents to the court's jurisdiction.[12] Many large and important countries are not parties to the Rome Statute at this time—including the United States, India, and China, but most of the North Atlantic Treaty Organization (NATO) countries have joined, and a total of 114 countries are currently parties.[13] The ICC sits at The Hague in the Netherlands, like the Yugoslav tribunal, and has similarly ambitious goals of justice, prevention, and "end[ing] impunity" for international crimes.[14] But the ICC differs from the other international criminal courts in one crucially important respect: it is a court designed to be *complementary to* and give primacy to *domestic* proceedings. The ICC itself only has jurisdiction to prosecute genocide, crimes against humanity, and war crimes if countries that otherwise have jurisdiction are "unable or unwilling" "genuinely" to investigate or prosecute.[15] This arrangement—called "complementarity"—gives states that are directly affected by atrocities the first opportunity to

10. For a discussion of East Timor's truth and reconciliation commission, see STROMSETH ET AL., *supra* note 1, at 285–88.

11. The Rome Statute of the International Criminal Court entered into force on July 1, 2002, after being ratified by sixty countries. *See About the Court*, ICC, http://www.icc-cpi.int/Menus/ICC/About+the+Court/ (last visited April 30, 2011).

12. Rome Statute of the International Criminal Court, Art. 17, July 17, 1998, 2187 U.N.T.S. 90 (hereinafter Rome Statute).

13. For a list of parties, see *The States Parties to the Rome Statute*, ICC, http://www.icc-cpi.int/Menus/ASP/states+parties/ (last visited Mar. 14, 2011).

14. Rome Statute, *supra* note 11, at Preamble.

15. *Id.* at Art. 17. Under the complementarity provisions of the ICC, a case is inadmissible if a state with jurisdiction has genuinely investigated the matter and prosecuted or made a good faith determination not to prosecute. States wishing to avoid ICC jurisdiction under the Rome Statute thus can take steps to ensure that they are able and willing to investigate and, if appropriate, to prosecute individuals domestically for ICC crimes. So ideally the impulses of sovereignty should combine with the prospect of international action to produce more effective national accountability efforts. For discussions of complementarity, see Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20 (2001); David J. Scheffer, *Fourteenth Waldemar A. Solf Lecture in International Law: A Negotiator's Perspective on the International Criminal Court*, 167 MIL. L. REV. 1, 10–11 (2001).

take action. If this sounds straightforward in principle, it is anything but in practice, as the Ugandan experience, discussed below, illustrates.

III. JUSTICE ON THE GROUND?

How, then, are the international and hybrid criminal courts influencing justice on the ground in the directly affected societies? To answer this question, one must look both at the public confidence dimension (the demand side) and the institutional capacity dimension (the supply side) of justice on the ground. I will spend a few minutes on each and then focus on unfolding developments in Uganda.

Let me begin by stressing that each conflict-affected society is unique in ways that will profoundly shape the possibilities for advancing justice on the ground. Understanding the local terrain deeply and fully is therefore essential. Countries' circumstances vary widely in crucial respects, including the condition of the domestic justice system, public attitudes and expectations about post-conflict accountability, the degree of tension among different groups or factions, the commitment (or lack thereof) of domestic leaders to accountability for atrocities, the prospects for supplementing trials with mechanisms such as truth and reconciliation commissions, reparations, and memorials, and in many other ways. Whether holding domestic or hybrid atrocity trials within the affected country is realistic at all or whether, instead, only international proceedings outside the country offer prospects for fair justice will also differ significantly across countries recovering from atrocities.

That said, common challenges often have arisen across these diverse countries, the first being whether criminal trials are building confidence in fair justice among the affected populations.

A. Demonstrating Fair Justice?

Criminal-atrocity trials inevitably convey messages about justice to the multiple audiences who are aware of their work. These messages, or demonstration effects, can either build or undermine public confidence in fair justice.

Ideally, fair and impartial criminal trials of those accused of atrocities should convey three crucial messages about justice and the rule of law. First, by holding individual perpetrators accountable for their actions, these proceedings aim to demonstrate that *certain conduct is out of bounds*: that no matter what your cause or grievance, genocide, crimes against humanity, and war crimes are unacceptable and universally condemned. Second,

impartial atrocity trials affirm that *impunity for these egregious crimes is being punctured*—that even if accountability is not perfect, increasingly it is possible, and perpetrators cannot presume on impunity. Third, trials for atrocity crimes should demonstrate and reassure people that *justice can be fair—procedurally fair* in terms of respect for due process and the rights of the accused, and *substantively fair* in terms of evenhanded treatment of comparable actions regardless of who committed them.

Why are these demonstration effects of atrocity trials important to justice on the ground in post-conflict societies? For very tangible reasons: by removing perpetrators of atrocities from positions in which they can control and abuse others, criminal trials can begin to reassure the population that old patterns of almost total impunity and rule by fear are no longer tolerable. Particularly in societies that have been wracked by persistent impunity and in which little confidence exists in justice or the rule of law, demonstrating through procedurally fair trials that even those with political and economic power can face accountability for egregious crimes can give citizens reason to expect (and to demand) accountability and fairer justice processes in the future. Furthermore, procedurally fair and impartial trials underscore the importance of respect for *all* persons, including defendants accused of severe atrocities, providing a concrete example of fair justice to domestic populations that may have little confidence in justice institutions based on prior experience.

Whether such positive demonstration effects are possible in specific post-conflict societies will depend significantly, however, on whether the affected population is aware of the accountability proceedings and views them as fair and legitimate. If the "big fish" go free and only the "little fish" are tried, there will be charges of bias. But the converse is also true: if only a few big fish are tried and the direct perpetrators on the ground face no justice or accountability of any kind, victim populations will question the fairness of justice. Either way, such proceedings may have negative, counterproductive demonstration effects.

This became painfully clear to me when I visited Sierra Leone in 2004, just as the Special Court for Sierra Leone, a hybrid criminal tribunal made up of international and national personnel, was beginning its first trial. Former Interior Minister Sam Hinga Norman, and two other leaders of the Civil Defense Force ("CDF"), were on trial for war crimes and crimes against humanity.[16] Sitting in the gallery with a full-house of Sierra Leoneans and a smattering of ex-patriots, I leaned forward to hear the first

16. Indictment Against Samuel Hinga Norman, Moinina Fofana & Allieu Kondewa (Feb. 5, 2004) (on file with the Special Court of Sierra Leone), *available at* http://www.sc-sl.org/LinkClick.aspx?fileticket=3DY274jtZAY=&tabid=104.

anxious witness testify about the cruel atrocities he had seen and experienced at the hands of the CDF. But as the proceedings began, several spectators in the gallery boisterously cheered support for the defendant Norman, who many viewed as a defender of the nation against rebels from the brutal Revolutionary United Front ("RUF"). In addition, during a break in the proceedings, and in later conversations, many Sierra Leoneans expressed to me their frustration that others were not also on trial: "What about the person who actually cut off my hand and is living right down the street?" implored several different amputees. So the complicated messages about justice that people were taking away from the Special Court's proceedings were evident from the very start.

But precisely because of the imperfect nature of international justice—which inevitably can focus on only a limited number of defendants in the face of widespread atrocities—the tribunals must work harder to engage local populations who will often be deeply skeptical of justice institutions based on bitter domestic experience. Focused, systematic efforts to understand and grapple with the criticisms of domestic audiences are essential if tribunals hope to build rather than undermine public confidence in fair justice. What is needed is meaningful outreach that grapples honestly with these challenges and difficulties, not sugar-coated press releases.

An example of the sort of outreach effort that has made a difference on the ground is the work of the dynamic, young team of Sierra Leonean outreach officers who work for the Special Court for Sierra Leone. For years, as the trials before the court have progressed, these Sierra Leoneans have traveled throughout the country to all the districts, holding community town-hall meetings with citizens in local dialects. Their goal is "to promote understanding of the Special Court and respect for human rights and the rule of law in Sierra Leone."[17] These remarkably forthright discussions have not been easy, particularly because many Sierra Leoneans deeply resent the fact that direct perpetrators of brutal atrocities, who may live right next door, are not being prosecuted. The Special Court's outreach staff has had to work hard to explain why the court is prosecuting those at the highest level as "most responsible" rather than lower-level perpetrators, about why the Civilian Defense Forces who defended the nation are also bound by international humanitarian law, and about what procedurally fair justice looks like. A prosecution and defense before an impartial tribunal is an important concept to convey to a population deeply skeptical of the fairness of justice systems and inclined, from bitter experience, to worry that people

17. Special Ct. for Sierra Leone, Outreach Mission Statement (Apr. 2008) (on file with author), *available at* http://www.sc-sl.org/ABOUT/CourtOrganization/TheRegistry/OutreachandPublicAffairs/tabid/83/Default.aspx.

may simply be "on the take." But for all these challenges (and many others), this substantial outreach program has been vital in involving the Sierra Leonean people in the work of the court[18]; and stands in marked contrast to the lack of systematic outreach—or belated outreach—in many other post-conflict contexts.

Of course, the potential for meaningful educational outreach that builds public understanding will vary in different conflict-affected societies. The ICC faces special challenges as an outside body that many locals may view skeptically. Hybrid courts that are locally based—like domestic courts—enjoy some distinct advantages due to their physical proximity and the participation of nationals who understand the local culture and languages and can travel more extensively around the country. Even so, in countries like Cambodia where domestic distrust of national courts runs deep because they are marred by political influence, the hybrid tribunal faces some of the same skepticism;[19] indeed, whether the public ultimately will regard that tribunal as setting a positive example of fair and impartial justice remains to be seen. So one must be realistic about the challenges tribunals face in demonstrating credibly to the local population that impunity is being punctured for egregious crimes and that justice can be fair. But precisely because of these challenges, tribunals must address public concerns about their work and engage in meaningful outreach to affected populations if they aspire to build public trust in justice and the rule of law.

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18. There is no doubt that Sierra Leone's outreach efforts are having an impact in building public awareness of the Special Court's important work. In a society where travel to rural areas is difficult and access to media is limited, the outreach staff has managed—creatively and thoughtfully—to engage the population on critically important issues of justice and accountability. Survey research indicates that significant majorities are aware of the court and generally view its work positively, but other studies offer a more mixed and critical account of the outreach program. Additional research clearly is needed to assess the longer-term impact of these outreach efforts, particularly in light of the vast domestic needs that continue to plague Sierra Leone. For research assessing the Special Court's outreach program, see RACHEL KERR & JESSICA LINCOLN, WAR CRIMES RESEARCH GRP., DEP'T OF WAR STUDS., KING'S COLL. LONDON, THE SPECIAL COURT FOR SIERRA LEONE: OUTREACH, LEGACY AND IMPACT (Draft Interim Report July 2007); TOM PERRIELLO & MARIEKE WIERDA, INT'L CTR. FOR TRANSITIONAL JUSTICE, THE SPECIAL COURT FOR SIERRA LEONE UNDER SCRUTINY 36–40 (March 2006); MEMUNATU BABY PRATT, NATION-WIDE SURVEY ON PUBLIC PERCEPTIONS OF THE SPECIAL COURT FOR SIERRA LEONE (2007).

19. Within Cambodia, public confidence in the impartiality of the domestic judicial system is extremely low. PHUONG PHAM ET AL., SO WE WILL NEVER FORGET: A POPULATION-BASED SURVEY ON ATTITUDES ABOUT SOCIAL RECONSTRUCTION AND THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA 4 (2009). Only about a third of Cambodians surveyed trust the national criminal justice system (36%), or Cambodian judges (37%). *Id.* Approximately a third of those surveyed expressed concerns about the independence of the hybrid war-crimes court, likely informed by the widespread distrust of the domestic justice system where political influence and bribery is a significant concern. *Id.* at 39, 4, 15–16.

B. Building Capacity?

Let me now address the capacity-building challenge: the need to develop fairer and more credible national justice systems in many conflict-affected societies. Capacity building is vital because preventing future atrocities and building public confidence in non-violent conflict resolution will depend on the real capacity to deliver at least a semblance of fair justice in domestic justice systems.

But all too often, well-resourced international tribunals and struggling domestic justice systems are two completely separate and unrelated worlds. The comfortable, well-stocked air conditioned offices, computers, ample administrative support, well-paid expert lawyers and other staff of the international and hybrid courts stand in stark contrast to the dilapidated, sweltering courtrooms, limited legal resources, poorly paid judges, and minimal administrative support or supplies in many domestic justice systems. To many locals, international and hybrid criminal courts are like alien "spaceships:" they arrive, do their business, and take off, leaving a befuddled domestic population scratching its head and wondering what, if anything, this has to do with the dire realities on the ground.

Furthermore, international and hybrid criminal trials are expensive and often compete for funds and human resources with struggling domestic justice systems, creating bitter resentments when national needs are shortchanged. I saw this first hand in Sierra Leone when the domestic Supreme Court justices with whom I met could barely contain their frustration over their lack of resources and administrative support compared to those at the special hybrid court. An intense tug-of-war over a talented local administrator ensued between the two courts. In other societies as well, local citizens and governments alike may resent the enormous resources devoted to international courts while domestic systems languish in need of assistance.

Of course, international and hybrid courts must focus on their fundamental goal of bringing criminal defendants to justice in accordance with international standards of due process. These trials are complex and challenging, and the tribunals' resources and personnel understandably are focused on this core task. However—and this is my fundamental point—there are opportunities for *synergies*, that is, for international and hybrid courts to contribute tangibly, if modestly, to domestic legal capacity while doing their own important work to advance justice.

Let me give some concrete examples, recognizing that how tribunals' domestic and international interactions are structured will have important implications for their capacity-building potential. Hybrid courts have some

built-in opportunities to contribute to domestic systems.[20] Even if they may compete for local talent in the near term, they can also help build domestic capacity in the long term by increasing the skills and experience of local legal professionals involved in the court's work, such as judges, prosecutors, defense counsel, administrators, and investigators—*at least* if the national participants ultimately remain in the country to contribute to the domestic system (which is not a foregone conclusion). In part, for this reason, the hybrid arrangements in East Timor and in Bosnia-Herzegovina were embedded more clearly into domestic judicial structures. Bosnia's special hybrid War Crimes Chamber is part of the national State Court of Bosnia, and international participation was phased out gradually over time.[21] In East Timor, domestic judges and prosecutors who gained valuable experience working on atrocity prosecutions and trials are continuing to use those skills in the domestic justice system.[22] In Sierra Leone, the Special Court worked directly with domestic police investigators, building their skills in witness management and protection and in other areas that will remain long after the Special Court has finished its work.[23] Hybrid courts can also reach out to build capacity in other ways, such as by offering educational workshops for national judges and lawyers, internships for law students, and so forth. Even purely international courts have at least some modest potential to contribute to domestic capacity if they give some thought and care to this question. The ICTY, for example, has provided tangible assistance to domestic courts handling war crimes cases as the ICTY wraps up its own work.[24]

A second kind of domestic capacity building is also crucially important, and that is empowering civil society—individuals and groups—to insist upon justice and accountability from domestic legal and political institutions. This is an important demand-side matter: building public understanding of justice and a capacity for advocacy. How can this be done? Hybrid and international courts can help empower and build capacity among civil society by convening a regular forum to engage with groups working on issues of justice and accountability, by offering educational workshops to schools and other civic organizations, and by reaching out directly to populations that might otherwise have limited access to justice or political power.

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20. For a thoughtful discussion, see Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295 (2003).

21. STROMSETH ET AL., *supra* note 1, at 267–68.

22. *Id.* at 283–84.

23. *Id.* at 298.

24. *Id.* at 270.

Such outreach and capacity building aimed directly at civil society can strengthen the long-term impact of international and hybrid tribunals. In East Timor, for example, international support helped build the Judicial System Monitoring Programme, a non-governmental organization ("NGO") that monitored proceedings before East Timor's hybrid war crimes tribunal and before its truth and reconciliation commission. The Judicial System Monitoring Programme continues to play a valuable role today by evaluating East Timor's national justice system, providing information to the wider public, and recommending reforms in the country's legal and political system.[25] There are other examples too, such as Sierra Leone's student "Accountability Now Clubs" and the Special Court Interactive Forum, a regular gathering of court personnel and local NGOs.[26] Such demand-side capacity building should also be a priority when international assistance is provided directly to support domestic criminal atrocity trials—or when the ICC itself is trying atrocity cases.

So let us turn now to the ICC, the new 600-pound actor on the international stage, an actor that is already affecting justice on the ground in some dramatic ways.

IV. THE ICC, UGANDA, AND JUSTICE ON THE GROUND

The ICC's catalyzing impact regarding justice on the ground is illustrated by the drama unfolding within Uganda—and between Uganda and the ICC—over bringing leaders of the infamous Lord's Resistance Army ("LRA") to justice. For over two decades, the LRA has waged an insurgency campaign against the government of Uganda.[27] Led by Joseph Kony, the LRA has murdered and raped civilians, abducted and enslaved children, and forced them to serve as child soldiers and to commit atrocities.[28] The primary victims of this violent campaign have been the Acholi people of Northern Uganda, of which Kony is a member.[29]

How did the ICC get involved in this situation? Uganda's President Yoweri Museveni asked the ICC to get involved. Specifically, in 2003, Uganda, a party to the ICC, referred the situation in Northern Uganda to the

25. *Id.* at 330. For more information, see the JUDICIAL SYSTEM MONITORING PROGRAMME, http://www.jsmp.minihub.org (last visited Mar. 14, 2011).

26. STROMSETH ET AL., *supra* note 1, at 297–98.

27. Scott Worden, *The Justice Dilemma in Uganda*, USIP Brief, Feb. 2008, at 1–2, *available at* http://www.usip.org/files/resources/1_3.PDF.

28. *Id.* at 1–2, 6–7.

29. *Id.* at 1–2, 7.

international court for investigation and potential prosecution. [30] Two years later, the ICC indicted Joseph Kony, leader of the LRA, along with four other LRA leaders for crimes against humanity.[31]

These indictments have had some galvanizing domestic effects. For one thing, they may well have contributed to Kony's decision to enter into peace negotiations with the Ugandan government.[32] These negotiations led to a 2007 framework peace agreement, followed by a more detailed 2008 agreement regarding accountability.[33] Under this accountability accord, the Ugandan government and the LRA agreed that LRA senior leaders most responsible for atrocities during the long civil conflict would be prosecuted in Ugandan domestic courts. Lower-level perpetrators, in contrast, would be held accountable before traditional justice mechanisms that emphasize apology, reconciliation, and reintegration rather than retributive justice.[34] But Kony failed to appear at the location on the Sudan–Congo border where the peace agreement was to be finalized.[35] Kony has said that "he will not surrender until the indictments" of the ICC are lifted.[36] The Ugandan government, in turn, said it would not seek a lifting of the indictments until Kony surrenders.[37]

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30. For an analysis of the self-referral, see William W. Burke-White & Scott Kaplan, *Shaping the Contours of Domestic Justice: The International Criminal Court and an Admissibility Challenge in the Uganda Situation*, U. PA. L. SCH. PUB. L. & LEGAL THEORY RES. PAPER SERIES, RES. PAPER NO. #08-13. A significant and unexpected twist on the role of the ICC has been the significant number of so-called "self referrals." This is where a country that has jurisdiction to try a case decides instead to refer the situation to the ICC. A state may "self refer" to the ICC for any number of reasons: it lacks sufficient capacity to try the case; faces domestic political difficulties in prosecuting a situation; needs assistance because perpetrators are in another country beyond the ability of the domestic state to assert enforcement jurisdiction; or because it seeks to put international pressure on rebel forces, to name a few. *Id.* Indeed, a substantial portion of the situations that the ICC is currently investigating are self-referrals, including the situation in Northern Uganda.

31. Only one of these indictees, besides Kony, is still alive today. *Id.*

32. Eight months after the ICC indictments were unsealed, the LRA indicated its willingness to resume a new round of peace negotiations with the government. *Id.*

33. Worden, *supra* note 27, at 2–3.

34. *Id.* at 1, 4.

35. Jeffrey Gettleman & Alexis Okeowo, *Warlord's Absence Derails Peace Efforts in Uganda*, N.Y. TIMES, Apr. 12, 2008, *available at* http://www.nytimes.com/2008/04/12/world/africa/12uganda.html.

36. *Id.*

37. *Id.* The government also is keenly aware of the strong preference of many Ugandan tribal elders and citizens for domestic justice rather than for international justice at The Hague. *Museveni Rejects Hague LRA Trial*, BBC NEWS (March 12, 2008), http://news.bbc.co.uk/2/hi/africa/7291274.stm; Jeffrey Gettleman & Alexi Okeowo, *Ugandan Rebels Delay Peace Deal*, N.Y. TIMES, Apr. 11, 2008, *available at* http://www.nytimes.com/2008/04/11/world/africa/11uganda.html.

How this will all turn out remains to be seen. Kony and the remnants of the LRA reportedly are back in the bush in a remote corner of the Democratic Republic of Congo where they continue to terrorize local villagers.[38]

Meanwhile, what domestic impacts have the ICC indictments had regarding justice on the ground in Uganda? First, the ICC indictments of LRA leaders have contributed to an ongoing and deeply-felt public debate down to the village level about justice and accountability. On the one hand, the ICC indictments have made clear that the crimes of which the LRA leadership is accused are universally condemned, and that impunity will not be accepted. On the other hand, the ICC—as an external agent injected into a complex domestic situation—has also triggered strong internal antibodies in reaction. For many Acholi leaders and citizens, the ICC's focus on international criminal justice is contrary to their strong preference for domestic accountability. The fact that so many of the LRA perpetrators are also victims—Acholi children who were forced to fight and to commit horrific acts—makes the idea of trials for other than a very select few deeply problematic for many Acholi.[39] Traditional justice mechanisms with a reparative rather than retributive focus are likely to be the preferred option in the vast majority of cases.

A second impact of the ICC indictment has been to encourage practical reforms to enable domestic prosecutions of LRA leaders for international crimes as an alternative to the ICC. For instance, the 2008 accountability accord provides that "a special division of the High Court of Uganda shall be established to try individuals who are alleged to have committed serious crimes during the conflict" with a focus on those individuals who "bear particular responsibility for the most serious crimes, especially crimes amounting to international crimes."[40] Moreover, in March 2010, Uganda's parliament passed a domestic law on accountability for international crimes.[41] As a result of these initiatives, Uganda may be both willing, and able, to prosecute some LRA leaders domestically, although some degree of international assistance may be important to reassure domestic and international audiences about the fairness of the proceedings. Depending on how matters evolve, prosecution of at least some LRA leaders before the

38. Worden, *supra* note 27, at 3.

39. *Id.* at 6–7.

40. *Id.* at 4.

41. In May 2010, Uganda's President Museveni signed the bill into law. *Uganda*, ICC, http://www.iccnow.org/?mod=country&iduct=181 (last visited May 12, 2012).

domestic War Crimes Division has the potential to satisfy the ICC's complementarity principle.[42]

Yet, whether Uganda's saga ultimately is a story about positive complementarity between international and domestic processes remains to be seen. It is possible to envision a division of labor in which the ICC prosecutes a few high-level LRA leaders, but assists Uganda in domestic prosecution of others, while lower level LRA members go through traditional reparative justice processes. But the extent to which the ICC will be willing to assist domestic prosecutions is not yet clear. Furthermore, whoever ends up prosecuting high-level LRA leaders will need to work hard to assure the communities most directly affected by the cases about the fairness of the process, providing them with good information about the proceedings and engaging in effective outreach to address their concerns.

If nothing else, the Ugandan experience shows that although the ICC's complementarity principle may be simple in theory, it can be quite complicated in practice. This is particularly true in circumstances where a government genuinely wishes to investigate and prosecute, but may need some external assistance to do so credibly and effectively. Although the principle of complementarity argues in favor of offering international support for domestic prosecutions in such circumstances, the ICC, as a new Court with a strong stake in establishing its own credibility,[43] may be reluctant, once it has investigated and indicted suspects, to step aside and let domestic courts prosecute, even if they are genuinely willing to do so and could (with some international assistance) be able to do so fairly. How situations like this ultimately are resolved has profound implications for domestic capacity building.

Looking forward, the extent to which the ICC will be prepared to take a more proactive role in providing—or encouraging others to provide—international assistance to domestic prosecutions of international crimes will be a central issue. "Positive complementarity" was debated actively

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42. If the government ultimately wishes to prosecute LRA leaders already indicted by the ICC, the government presumably would seek to challenge the admissibility of those cases before the ICC. Whether, based on the principle of complementarity, the ICC Pre-Trial Chamber would rule the matter inadmissible before the international court would depend on issues such as the nature of the charges, proceedings, and potential penalty facing Kony and other LRA leaders in Ugandan domestic court. For a thoughtful analysis, see Burke-White & Kaplan, *supra* note 30.

43. See Tom Ginsburg's helpful discussion on this point: *The Clash of Commitments at the International Criminal Court*, 9 CHI. J. INT'L L. 499 (2009), *available at* http://works.bepress.com/tom_ginsburg/26.

during the ICC Review Conference in Kapala, Uganda in May–June 2010.[44] Even independent of the ICC itself, new, more flexible, and informal hybrid arrangements in which transnational networks of experts provide assistance to domestic justice systems prosecuting atrocity crimes may become more significant in the future. Indeed, we arguably are entering a new phase (4.1.?) that may be the dominant trend of the future in international criminal law: namely, direct international assistance to *domestic justice systems* that are willing to try international crimes but need external assistance to do so fairly and effectively, or what might be called *domestic prosecutions with international support.* International non-governmental organizations, such as the International Bar Association and other networks of legal experts, as well as governments and the UN, are beginning to provide such support, with the aim of assisting domestic systems to prosecute international crimes consistently with international standards of due process.[45] This road is an important but challenging one because ensuring basic due process and fair and independent judicial decision-making is contingent on domestic systems actually rising to the challenge. Whatever particular form international assistance takes, those involved should look for synergies that will help strengthen domestic capacity for justice on the ground in enduring ways.

V. CONCLUSION

So where does this all lead us? Are international and hybrid criminal courts contributing substantially to justice on the ground in the post-conflict societies most directly affected by the crimes these courts are prosecuting, and how might they do better in the future? Let me make two main points by way of conclusion.

First, the impact of international and hybrid trials "on the ground" in terms of their demonstration effects and capacity-building effects has been a complicated and mixed story thus far, as the experience of the last decade suggests. Furthermore, the messages about justice that international and

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44. Press Release, ICC, Review Conference: ICC President and Prosecutor participate in panels on complementarity and co-operation (June 3, 2010), *available at* http://www.icc-cpi.int/NR/exeres/0A7DEDFE-4308-4487-992D-1ED77AB5CAAE.htm.

45. For discussion of different modes of international assistance to domestic trials, see Elena Baylis, *Reassessing the Role of International Criminal Law: Rebuilding National Courts through Transnational Networks*, 50 B.C. L. REV. 1 (2009); William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of Justice*, 49 HARV. INT'L L.J. 53 (2008); Jenia Iontcheva Turner, *Transnational Networks and International Criminal Justice*, 105 MICH. L. REV. 985 (2007).

hybrid courts impart are always going to be contested and imperfect, and this should be acknowledged with honesty and humility.

Criminal trials alone, even with ambitious outreach programs, are—at best—only part of what is needed to grapple with past atrocities. Trials focus on only a limited number of defendants and, as a result, often leave a "justice gap" that undermines their credibility among local audiences. Different groups within the affected societies inevitably will have sharply differing views about the fairness or adequacy of the endeavor. Furthermore, other accountability processes, such as truth and reconciliation commissions, or efforts to provide reparative justice through modest reparations to victims, may touch more people on the ground more directly. Combined approaches that also include truth and reconciliation mechanisms and forms of reparative justice, as in East Timor, may produce more effective and far-reaching demonstration effects and capacity building than trials alone.

Yet, however the balance between trials and other accountability measures is ultimately constructed, international or hybrid trials will send messages nonetheless. Those involved in these tribunals need to be more aware of the impact they are having in terms of local populations' views of, and confidence about, fair justice. Indeed, if these tribunals hope to convey in any credible way that certain conduct—genocide, crimes against humanity, war crimes—is out of bounds, that impunity for such crimes is beginning to be punctured, and that justice can and should be fair, they need to work harder to engage local populations who often will be justifiably skeptical of justice institutions based on prior domestic experience.

Second, with a bit more vision, effort, planning, and resources, international and hybrid courts can do much more to advance justice on the ground in the societies most affected by the atrocities they are prosecuting, even despite all the difficulties. By thoughtfully developing a domestic-impact strategy that includes several key elements, these tribunals could contribute more substantially to building public confidence about fair justice and to strengthening domestic capacity in societies recovering from atrocities. These elements include: (1) understanding the local terrain more deeply and fully; (2) thinking systematically about the tribunal's demonstration effects and being creative about outreach; and (3) being proactive about capacity building and looking for synergies.

To be sure, most of the people working at international or hybrid courts—as prosecutors, judges, defense counsel, administrators, investigators, and so forth—will concentrate, as they *should*, on the tribunals' central responsibility of bringing to justice, in procedurally fair trials that accord with international standards of due process, those accused

of atrocity crimes. As a result, they may regard questions about the domestic impact of the tribunal's work in the affected country (in terms of public perceptions about the court's work or domestic capacity building) as not their responsibility or, at best, as an add-on to their already busy jobs. But this is precisely why having a dedicated staff with specific responsibility and resources for outreach and capacity building is so important. This team of people should be multi-disciplinary, including not only legal experts, but also country experts and anthropologists, who can work together with local leaders and civil society groups to increase the possibilities for constructive domestic engagement and capacity building as part of a tribunal's work.

Developing outreach programs that engage meaningfully with the affected domestic population—explaining the proceedings, their basis, and their implications, and addressing criticisms and concerns—should be an important priority in decades ahead.[46] This is true whether it is the ICC, hybrid courts, or domestic justice systems that ultimately try atrocity cases. Because atrocity trials put the issue of accountability and justice squarely on the national agenda and galvanize public awareness and discussion of these crucial matters, they can contribute to greater citizen understanding of, and demand for, accountability and fair justice going forward. This potential for empowering ripple effects should be nurtured in thoughtful and creative ways.

In seeking to do this, scholars and practitioners alike can help refine our understanding of the impact on the ground of different post-conflict accountability processes. We are beginning to see helpful empirical work, such as the studies in East Timor of the community-based reconciliation process and the perceptions of the victims, perpetrators, and others who participated.[47] Further scholarly work examining the impact of criminal atrocity trials (and other accountability mechanisms) on public understandings and confidence about justice in affected post-conflict countries could be especially useful in future efforts to develop more meaningful and effective outreach programs. Moreover, practitioners who have led creative outreach efforts, such as in Sierra Leone, can offer valuable insight to those developing similar initiatives in other settings.

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46. Outreach programs that respond appropriately and creatively to local circumstances, and that use media and the arts in culturally resonant ways, can be particularly helpful in engaging with local audiences. For an innovative example of radio-based outreach, see INTERACTIVE RADIO FOR JUSTICE, http://www.irfj.org (last visited May 12, 2010).

47. For examples, see PIERS PIGOU, U.N. DEV. PROGRAMME, THE COMMUNITY RECONCILIATION PROCESS OF THE COMMISSION FOR RECEPTION, TRUTH, AND RECONCILIATION (2004), and SPENCER ZIFCAK, THE ASIA FOUND., RESTORATIVE JUSTICE IN EAST TIMOR: AN EVALUATION OF THE COMMUNITY RECONCILIATION PROCESS OF THE CAVR (2004).

Also vital to advancing justice on the ground is being proactive about domestic capacity building and looking for synergies—that is, for ways that international and hybrid tribunals can contribute concretely to domestic legal capacity while doing their own important work to advance justice. Given the resources (relatively speaking) that international and hybrid courts enjoy, they can, with a bit more effort and systematic planning make more tangible and meaningful contributions to domestic justice systems and to civil society empowerment in the societies affected by the atrocities being prosecuted. Furthermore, in many situations where the prospect of potential ICC prosecution serves to prod and encourage responsible national investigation and prosecution of atrocities, direct international assistance to domestic justice systems may often be essential to ensuring fair and credible proceedings. In such circumstances, how the complementarity principle is implemented and whether the ICC will be prepared to take a more active role in assisting or encouraging others to assist with the domestic trials will be crucially important questions going forward.

Ultimately, the blending of international capacity and local aspirations and abilities in the pursuit of criminal justice is a complex human endeavor—one that will never be free of tension or turbulence. The era that seems to be emerging, of more proactive international assistance to *domestic* prosecutions of atrocity crimes, will raise its own challenges and dilemmas. But hopefully, in the next phase, we will see greater attention paid to *prevention* of egregious international crimes, as well as to public concerns about fair justice in the affected societies: in effect, a clearer focus not only on justice at The Hague but also on justice on the ground.

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